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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 STRIKE 3 HOLDINGS, LLC,

Case No. 2:19-cv-00144-APG-GWF

8 Plaintiff,

9 v.

ORDER

10 JOHN DOE subscriber assigned IP address
70.170.107.43,

11 Defendant.
12

13 This matter is before the Court on Plaintiff's Ex Parte Motion for Leave to Serve a Third
14 Party Subpoena Prior to Rule 26(f) Conference (ECF No. 5), filed on February 13, 2019. Since
15 no Defendants have been named or served, no opposition or reply briefs have been filed.

16 **BACKGROUND**

17 On July 25, 2019, Plaintiff Strike 3 Holdings LLC., ("Plaintiff") filed a complaint against
18 John Doe subscriber assigned IP address 70.170.107.43 ("Defendant"). Plaintiff asserts that it is
19 the registered owner of the copyright for digital media and motion pictures featured on its
20 brand's subscription-based adult websites. *Complaint* (ECF No. 1, 3). Plaintiff alleges a claim
21 of copyright infringement, stating that Defendant reproduced and distributed Plaintiff's
22 copyrighted work through the use of BitTorrent, a peer-to-peer file sharing system. *Id.* at 3-4.
23 Plaintiff filed the instant Motion requesting leave to serve a third party subpoena prior to
24 discovery in order to ascertain the identity of the Doe Defendant from their Internet Service
25 Providers ("ISPs") through their Internet Protocol ("IP") address. To obtain the IP address of the
26 Defendant using BitTorrent Plaintiff hired forensic investigator, IPP International UG ("IPP").
27 ECF No. 5-1, Decl. of Tobias Fieser ("Fieser Decl."), Ex. 1. Since Plaintiff can only identify
28 Defendant via the IP address, it seeks leave to serve a Rule 45 subpoena on the ISP and any

1 related intermediary ISPs demanding the true name and address of the Defendant to whom the
2 ISP issued an Internet Protocol (“IP”) address. ECF No. 5, 2. Plaintiff asserts that it will only
3 use this information to prosecute the claims made in its Complaint. *Id.* at 2.

4 Plaintiff represents that good cause exists to grant its request because: (1) it identified
5 Doe Defendant with sufficient specificity, (2) Plaintiff’s Complaint could withstand a motion to
6 dismiss, (3) there is a reasonable likelihood that Plaintiff can identify the Defendant and
7 effectuate service, and (4) Plaintiff cannot properly identify and serve the Defendant without the
8 subpoena. *Id.* at 5-11.

9 **LEGAL STANDARDS**

10 **I. The Cable Privacy Act**

11 The Cable Privacy Act generally prohibits cable operators from disclosing personally
12 identifiable information regarding subscribers without the prior written or electronic consent of
13 the subscriber. 47 U.S.C. § 551(c)(1). A cable operator, however, may disclose such
14 information if the disclosure is made pursuant to a court order and the cable operator provides
15 the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). A cable operator is defined as
16 “any person or group of persons (A) who provides cable service over a cable system and directly
17 or through one or more affiliates owns a significant interest in such cable system, or (B) who
18 otherwise controls or is responsible for, through any arrangement, the management and operation
19 of such a cable system.” 47 U.S.C. § 522(5). The ISP that Plaintiff intends to subpoena in this
20 case is a cable operator within the meaning of the Act.

21 **II. Discovery Requests Prior to the Rule 26(f) Conference**

22 Generally, discovery is not permitted without a court order before the parties have held a
23 conference pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1).
24 “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to ensue
25 after filing of the complaint to permit the plaintiff to learn the identifying facts necessary to
26 permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577
27 (N.D.Cal.1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.1980)). “The Ninth
28 Circuit has held that when the defendants’ identities are unknown at the time the complaint is

1 filed, courts may grant plaintiffs leave to take early discovery to determine the defendants'
2 identities 'unless it is clear that discovery would not uncover the identities, or that the complaint
3 would be dismissed on other grounds.'" *808 Holdings, LLC v. Collective of December 29, 2011*
4 *Sharing Hash*, 2012 U.S. Dist. LEXIS 62980, *7 (S.D.Cal. May 4, 2012) (quoting *Gillespie*, 629
5 F.2d at 642). "A district court's decision to grant discovery to determine jurisdictional facts is a
6 matter of discretion." *Columbia Ins.*, 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells*
7 *Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir.1977)). To determine whether to grant a
8 request for early discovery, the court shall apply the conventional "good cause" standard that
9 weighs the need for discovery to further justice against the prejudice to the opposing party.
10 *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D.Cal.2002).

11 Courts in this district apply a three-factor test when considering motions for early
12 discovery to locate certain defendants. *Columbia Ins.*, 185 F.R.D. at 578–80. First, "the plaintiff
13 should identify the missing party with sufficient specificity such that the Court can determine
14 that defendant is a real person or entity who could be sued in federal court." *Id.* at 578. Second,
15 the plaintiff "should identify all previous steps taken to locate the elusive defendant" to ensure
16 that the plaintiff has made a good faith effort to identify and serve process on the defendant. *Id.*
17 at 579. Third, the "plaintiff should establish to the Court's satisfaction that plaintiff's suit against
18 defendant could withstand a motion to dismiss." *Id.* (citing *Gillespie*, 629 F.2d at 642). "[T]o
19 prevent abuse of this extraordinary application of the discovery process and to ensure that the
20 plaintiff has standing to pursue an action against defendant," plaintiff must show that some act
21 giving rise to liability actually occurred and that the discovery is aimed at identifying the person
22 who allegedly committed the act. *Id.* at 579–80 (citing *Plant v. Various John Does*, 19
23 F.Supp.2d 1316, 1321 n. 2 (S.D.Fla.1998)).

24 Typically, District Courts within the Ninth Circuit have found good cause supporting a
25 request for early or expedited discovery in copyright infringement cases where the plaintiff
26 alleges that its copyrighted work has been infringed upon through a peer-to-peer file sharing
27 system, and sought early discovery to obtain the identities and addresses of the alleged infringers
28 through their respective ISPs. See, e.g., *UMG Recordings, Inc. v. Doe*, 2008 WL 4104214 (N.D.

1 Cal. 2008) (granting leave to serve Rule 45 subpoena to identify doe defendant); *Malibu Media,*
2 *LLC v. John Does 1-10*, 2012 WL 5382304 (C.D. Cal. June 27, 2012) (same).

3 **DISCUSSION**

4 **I. Good Cause Exists for Leave to Conduct Expedited Discovery**

5 Plaintiff has demonstrated good cause exists for leave to take limited early discovery by
6 successfully pleading the three factors discussed above.

7 **A. Identification of Missing Parties with Sufficient Specificity**

8 Due to the nature of internet copyright infringement cases, Plaintiff is only required to
9 identify Defendant with sufficient specificity “to ensure that federal requirements of jurisdiction
10 and justiciability can be satisfied.” *Columbia Ins.*, 185 F.R.D. at 578. “[A] plaintiff identifies
11 Doe defendants with sufficient specificity by providing the unique IP addresses assigned to an
12 individual defendant on the day of the allegedly infringing conduct, and by using 'geolocation
13 technology' to trace the IP addresses to a physical point of origin.” *808 Holdings*, 2012 WL
14 1648838, *4 (quoting *OpenMind Solutions, Inc. v. Does 1-39*, 2011 WL 4715200 (N.D. Cal. Oct.
15 7, 2011)).

16 Here, Plaintiff used Maxmind, a geolocation technology, to trace Defendant’s IP address
17 to a geographic area within the Court’s jurisdiction. Plaintiff submitted a chart (albeit to its
18 Complaint) that lists the unique IP address which corresponds to the individual Defendant and
19 the ISP it is associated with. See Complaint (ECF No. 1-1); see also Fieser Decl. (ECF No. 5-1).
20 The list also includes the dates and times of the alleged infringing activity, as well as the city and
21 state where the IP address is located. *Id.* Therefore, Plaintiff has identified the Doe Defendant
22 with sufficient specificity and has presented evidence that the IP address is physically located in
23 this district. See *OpenMind Solutions*, 2011 WL 4715200 (concluding that plaintiff satisfied the
24 first factor by identifying the defendants' IP addresses and by tracing the IP addresses to a point
25 of origin within the State of California).

26 **B. Previous Attempts to Locate the Unknown Defendant**

27 Plaintiff is also required to describe what good faith attempts have been made to locate
28 and serve Defendant. See *Columbia Ins.*, 185 F.R.D. at 579. Plaintiff’s motion alleges several

1 ways in which it attempted to identify Defendant including: searching the Defendant's IP address
2 on various search engines like <http://www.google.com>; research on its ability to identify the
3 Defendant by means outside of the instant motion; and hiring computer investigator and cyber
4 security consultant. ECF No. 5. Plaintiff maintains that it "has been unable to identify any other
5 way to go about obtaining the identities of its infringers and does not know how else it could
6 possibly enforce its copyrights from illegal piracy over the Internet." *Id.* at 7. Thus, Plaintiff
7 argues that it has established good cause. *Id.* The Court agrees. It appears as though Plaintiff
8 has utilized all available avenues in a good faith effort to identify and locate Defendants. Thus,
9 this factor has been met.

10 **C. Ability to Withstand a Motion to Dismiss**

11 The last prong requires Plaintiff to show "that an act giving rise to civil liability actually
12 occurred and that the discovery is aimed at revealing specific identifying features of the person
13 or entity who committed that act." *Columbia Ins.*, 185 F.R.D. at 580. In other words, Plaintiff
14 must demonstrate that its Complaint is able to withstand a motion to dismiss. *Id.* at 579.

15 To prevail in a copyright infringement action, a plaintiff "must show: (1) ownership of a
16 valid copyright; and (2) that the defendant violated the copyright owner's exclusive rights under
17 the Copyright Act." *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C.
18 § 501(a) (2003); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000)).

19 Plaintiff's complaint establishes that Plaintiff is the registered owner of the copyrights for
20 several motion pictures. ECF No. 1, Ex. A. Plaintiff also avers that Defendant illegally obtained
21 Plaintiff's copyrighted work through the use of the BitTorrent protocol and thereafter illegally
22 reproduced and distributed it. *Id.* at 3. Consequently, Plaintiff has alleged a prima facie case of
23 copyright infringement which may withstand a motion to dismiss. In addition, Plaintiffs allege
24 the geolocation technology traced the Defendant's IP address to a geographic area within the
25 Court's jurisdiction. ECF No. 5, 6. Furthermore, while Plaintiff's motion does not address the
26 issue of venue, its Complaint sufficiently alleges that venue is proper because although the true
27 identity of the Defendant is unknown, the Defendant may be found within this district.

28 *Complaint* (ECF No. 1,2).

1 the information sought by Plaintiff in the subpoena pending resolution of such motion or
2 challenge.

3 5. Plaintiff may only use the information disclosed in response to a Rule 45 subpoena
4 served on the ISP for the sole purpose of enforcing Plaintiff's rights as set forth in its Complaint.

5 Dated this 20th day of February, 2019.

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9 GEORGE FOLEY, JR.
10 UNITED STATES MAGISTRATE JUDGE
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